DEC 13 2004
Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

No. 03-1500

DEC 13 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,
Petitioner,

v.

RICK PERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND NATIONAL COUNCIL OF JEWISH WOMEN, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

AYESHA KHAN
RICHARD B. KATSKEE
ALEX J. LUCHENITSER
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, N.E.
Washington, DC 20002
(202) 466-3234

IAN HEATH GERSHENGORN *
WILLIAM M. HOHENGARTEN
VICTORIA H. JUEDS
THOMAS G. PULHAM
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, DC 20036
(202) 467-4999

December 13, 2004

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Longevity Of A Religious Display Does Not Render It Constitutional 4

II. The Absence Of A Previous Challenge To A Longstanding Religious Display Deserves No Weight In The Constitutional Calculus 11

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

ACLU of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983) 6

Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391 (10th Cir. 1985) 14

Board of Education of Kinyas Joel Village School District v. Grumet, 512 U.S. 687 (1994) 9

Carpenter v. City of San Francisco, 93 F.3d 627 (9th Cir. 1996) 7, 8

Coles ex rel. Coles v. Cleveland Board of Education, 171 F.3d 369 (6th Cir. 1999) 9

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 4, 5, 7, 9

Edwards v. Aguillard, 482 U.S. 578 (1987) 7

Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir. 1993) 7, 8

Elrod v. Burns, 427 U.S. 347 (1976) 6

Freedom from Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000) 10

Freethought Soiety of Greater Philadelphia v. Chester County, 334 F.3d 247 (3d Cir. 2003).. 2, 6, 12

Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777 (10th Cir. 1985) 7

Glassroth v. Moore, 335 F.3d 1282 (11th Cir.), *cert. denied*, 540 U.S. 1000 (2003) 17

Gonzales v. North Township, 4 F.3d 1412 (7th Cir. 1993) 6, 8

Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991) 7

Herdahl v. Pontotoc County School District, 887 F. Supp. 902 (N.D. Miss. 1995) 15

Herdahl v. Pontotoc County School District, 933 F. Supp. 582 (N.D. Miss. 1996) 15

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948) 14

Jewish War Veterans of the United States v. United States, 695 F. Supp. 1 (D.D.C. 1987) 10

Lynch v. Donnelly, 465 U.S. 668 (1984) 4, 9, 12

Meyer v. Nebraska, 262 U.S. 390 (1923) 13

Minersville School District v. Gobitis, 310 U.S. 586 (1940) 13

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 12

Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995) 7

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 14

Separation of Church & State Committee v. City of Eugene, 93 F.3d 617 (9th Cir. 1996) 10

Stone v. Graham, 449 U.S. 39 (1980) 5, 7

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 4

Walter v. West Virginia Board of Education, 610 F. Supp. 1169 (S.D. W.Va. 1985) 15

Walz v. Tax Commission, 397 U.S. 664 (1970) 4

Washegesic v. Bloomingdale Public School, 33 F.3d 679 (6th Cir. 1994) 10

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 13

Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004) 15

LEGISLATIVE MATERIALS

Religious Expression: Hearings Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on Judiciary, 108th Cong. (June 8, 2004) (Testimony of Steven Rosenauer), *available at* 2004 WL 1304689 16

MISCELLANEOUS

Sydney E. Ahlstrom, *A Religious History of the American People* (1972) 12, 13

Robert S. Alley, *Without a Prayer: Religious Expression in Public Schools* (1996) 14, 15, 16

Rob Boston, *Plucky Lindy*, Church & State (Apr. 2004) 17

Denyse Clark, *Parrot's Death Latest Threat To Woman In Prayer Case*, The Herald (Rock Hill, S.C.), Aug. 17, 2004, *available at* 2004 WL 89767640 16

Laura Green, *A Show of Defiance: Prayer Supporters Rally; A minister tells the crowd of 200 that the couple who filed suit against the School Board should "move,"* Sarasota Herald Trib., Feb. 25, 2004 16

History of the International Reform Bureau 2 (1910), *reprinted in Patriotic Studies of a Quarter Century of Moral Legislation* (Wilbur F. Crafts ed. 1911) 13

Letter from Chief Justice William H. Rehnquist to Nihad Awad & Ibrahim Hooper (Mar. 11, 1997) 11

Religious Right Campaign Launched From Upper Michigan, Freethought Today (Aug. 1997), at http://www.ffrf.org/fttoday/ 1997/august97/ front_page.html 8

Stephanie Saul, *A Lonely Battle in the Bible Belt: A Mother Fights To Halt Prayers At Miss. School*, Newsday, Mar. 13, 1995 15

Wayne R. Swanson, *The Christ Child Goes to Court* (1990) 14

Ten Commandments Take Center Stage, ACLU Freedom Network (Jan. 7, 2000), at http://archive.aclu.org/news/2000/w010700b. html 8

The Very Time to Post the Commandments, 20th Century Quarterly (Dec. 1918) 13

Laurence Tribe & Michael Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057 (1990) 6

INTEREST OF *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a 75,000-member national, nonsectarian public interest organization committed to defending religious liberty and the separation of church and state. Since its founding in 1947, Americans United has regularly been involved as a party, as counsel, or as an *amicus curiae* in leading church-state cases before this Court and other federal and state courts. Americans United has long experience litigating challenges to government displays of religion and, indeed, is currently serving as counsel to the plaintiffs in several cases in the lower federal courts that challenge Eagles-produced Ten Commandments monuments that are virtually indistinguishable from the one at issue here. As an organization frequently involved in such litigation, as well as in other categories of cases brought under the Establishment Clause, Americans United believes that it can offer the Court special insight into the constitutional issues raised by this case.

People For the American Way Foundation ("PFAWF") is a non-profit, nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 600,000 members and activists nationwide. PFAWF has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend religious liberty and the separation of church and state. PFAWF has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles

---

[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *Amici Curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

at stake in this case, particularly the principles that government officials must remain neutral toward religion, that they cannot act for the purpose of advancing religion, and that government displays that endorse religion trample on religious freedom and violate the separation of church and state.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve the quality of life for women, children, and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the NCJW has 90,000 members, supporters, and volunteers in over 500 communities nationwide. NCJW joins this brief, which is consistent with NCJW's National Principle that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society."

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below concluded that the Ten Commandments monument on the grounds of the Texas State Capitol does not run afoul of the Establishment Clause, in large part because "it has been in place for so long," Pet. App. 16a, and because its retention is "'motivated, in significant part, by the desire to preserve a longstanding [monument].'" *Id.* (quoting *Freethought Soc. of Greater Phila. v. Chester County*, 334 F.3d 247, 265 (3d Cir. 2003)). This conclusion – that a large freestanding granite monument with the full text of the Ten Commandments situated on the grounds of the Texas State Capitol may be permissible simply because it has existed for a long period of time – is fundamentally misguided.

It is a well-established tenet of Establishment Clause jurisprudence that, although the history of a practice or display may matter, its mere longevity does not. The fact

that a practice or display is longstanding cannot, in and of itself, validate it under the Constitution. Thus, the Court has recognized that some longstanding government practices may be permissible even though they appear on their face to be religious, but only because the practices have lost their religious significance. Similarly, some displays may be maintained when they have secular historical significance apart from the mere passage of time. In order to ensure, however, that an asserted historical rationale is sincere, when the government seeks to justify a display or practice on the basis of its historical significance, courts must engage in a searching inquiry to ensure that the display or practice is being retained for, and communicates a message of, historical rather than religious dimensions. This inquiry must take account of several factors, including whether the display truly has historical significance, whether that historical significance is independent of the display's religious content, whether there are available secular alternatives to achieve the same secular goals, and whether the government has acted consistently with its asserted rationale with respect to non-religious displays.

That only history, and not longevity, should affect the constitutional analysis is reinforced by the fact that plaintiffs raising Establishment Clause challenges face a substantial risk of disapprobation and even violence in their communities. A religious display may become longstanding simply because individuals are deterred from bringing a challenge by the ostracism and risks to personal safety that such a challenge may entail. The Fifth Circuit below was thus wrong to suggest that the absence of a prior constitutional challenge is evidence that the granite monument of the Ten Commandments conveys no message of endorsement of religion and does not offend the significant interests that the Establishment Clause seeks to advance.

ARGUMENT

I. The Longevity Of A Religious Display Does Not Render It Constitutional.

"[H]istory cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (footnote omitted); *see also id.* at 630 (O'Connor, J., concurring) ("Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment."). "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

Thus, if a government-sponsored display demonstrates allegiance to religion in general, or to a particular religion, it will properly be found to run afoul of the Establishment Clause – whether it was erected yesterday, 50 years ago, or 150 years ago.

Indeed, the retention of a longstanding religious display is in some ways more troubling than the erection of a contemporary display because the former course of action conveys the impression that the government's religious allegiance is entrenched and unyielding; it suggests that the message of exclusivity cannot be attributed to a passing fad, but is instead ingrained in the fabric of the community. In such circumstances, the "message to nonadherents that they are outsiders," *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), becomes a message that they have always been, and will forever remain, outsiders.

To be sure, the Court has recognized that some longstanding government practices may be permissible even though they appear on their face to be religious. This conclusion, however, flows not from the longevity of such practices, but from the fact that they have "largely los[t their] religious significance over time." *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring). Thus, the Thanksgiving celebration "is now generally understood as a celebration of patriotic values rather than particular religious beliefs." *Id.*

As even the Fifth Circuit below acknowledged, however, the Ten Commandments have not lost their religious significance over time. *See* Pet. App. 17a (recognizing that "there is no escape" from the Ten Commandments' "religious character"). This acknowledgment is inescapable in light of this Court's recognition that "the Commandments do not confine themselves to arguably secular matters . . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day." *Stone v. Graham*, 449 U.S. 39, 41-42 (1980).

Indeed, the Ten Commandments retain not just religious, but also sectarian, significance. The Ten Commandments are "undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* (footnote omitted). It is a "bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith." *Allegheny*, 492 U.S. at 605.

The monument under scrutiny in this case – showcasing a text that a reasonable observer would recognize as promoting religion – cannot be deemed to have lost its religious significance over time. It was thus error for the Fifth Circuit to conclude that the Texas Ten Commandments monument

does not run afoul of the Establishment Clause because "it has been in place for so long." Pet. App. 16a.

Nor does the outcome change because of the claim that the government was "'motivated, in significant part, by the desire to preserve a longstanding [monument],'" Pet. App. 16a (quoting *Freethought Society*, 334 F.3d at 265), or that the monument is a "reminder of past events," 334 F.3d at 265. That is simply another way of saying that the monument can be legitimately retained solely because of its age. Such bootstrapping has no place in the law, under the Establishment Clause or elsewhere. *See, e.g.*, *Gonzales v. North Township*, 4 F.3d 1412, 1422 (7th Cir. 1993) (noting that "[w]e do not accept this sort of bootstrapping argument" that "the longer the violation, the less violative it becomes"); *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983) ("[H]istorical acceptance without more does not provide a rational basis for ignoring the command of the Establishment Clause that a state pursue a course of neutrality towards religion.") (quotation marks and citation omitted); *see also Elrod v. Burns*, 427 U.S. 347, 369 n.22 (1976) ("[I]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure.") (quotation marks and citation omitted); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057, 1088 (1990) ("[T]he presence of positive laws encroaching upon a right does not negate the fundamentality of that right. If it did, then governments could violate constitutional norms by persisting in a pattern of unconstitutional enactments.").

That is not to say that *history* – as opposed to longevity – makes no difference. The retention of a longstanding display may be justified on a historical basis that is independent of its religious content. Thus, a church that was used as a stop on

the Underground Railroad and is no longer used for religious services may be maintained by the government as an integral part of the history of slavery. That is because, in light of its history, it is "more a museum piece than a symbol of religious worship." *Carpenter v. City and County of San Francisco*, 93 F.3d 627, 631 (9th Cir. 1996) (quoting *Okrand v. City of Los Angeles*, 254 Cal. Rptr. 913, 922 (Cal. Ct. App. 1989)). In order to ensure, however, that an asserted historical rationale is sincere and not a sham, *see Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *Stone*, 449 U.S. at 42-43, and that a reasonable observer would appreciate that the display conveys a historical rather than religious message, several factors must be considered.

First, the "display's historical significance must be independent of the display's religious content." *Carpenter*, 93 F.3d at 631 (quotation marks and citation omitted). Thus, although the government could maintain the church that is no longer used for religious services because it was once a stop on the Underground Railroad, the government could not maintain a church because it was once the site of special religious observances. *See, e.g.*, *Ellis v. City of La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993) (refusing to consider "historical significance" of municipality's display of a cross in a city park when principal significance was its "use as the site for annual Easter services"). Similarly, a city seal that includes a cross in order to commemorate the city's religious heritage would be impermissible. *See Friedman v. Board of County Comm'rs*, 781 F.2d 777, 780-82 (10th Cir. 1985), *cited with approval in Allegheny*, 492 U.S. at 629 (O'Connor, J., concurring); *see also Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995); *Harris v. City of Zion*, 927 F.2d 1401, 1414-15 (7th Cir. 1991) (holding that although city's "religious heritage may deserve commemoration, Christian symbols on city seal transcend mere commemoration, and effectively endorse or promote the Christian faith").

Second, the historical event or circumstance that is being commemorated by the display must truly have historical significance. To claim that something has historical significance simply because it happened in the past, or that it has assumed significance simply by virtue of its longstanding existence, would allow the government to maintain or even financially support any pre-existing religious institution or display.[2] Instead, courts must distinguish "the historical significance that a symbol may achieve because of an unusual or unique event or circumstances surrounding it, from the local cultural landmark significance that a symbol may achieve simply because it is displayed." *Gonzales*, 4 F.3d at 1422 n.9. Thus, a crucifix in a public park may not be defended on the ground that by a lengthy existence it has become a local landmark or tourist attraction. *See, e.g.*, *Ellis*, 990 F.2d at 1525 (fact that cross "serves as a navigational aid, or stands as a prominent landmark and tourist attraction," simply "underscore[s] the formidable nature of the display and increase[s] the likelihood of an impermissible appearance of religious preference"). Nor can a religious object without intrinsic historical significance gain historical significance merely by being affixed to a place that does have such significance. *See, e.g.*, *Carpenter*, 93 F.3d at 631 (rejecting government's effort to justify the preservation of a mountaintop cross as evocative of the history of the mountain

[2] That result would be particularly egregious for government-sponsored Ten Commandments displays because many of those displays were not acquired by local governments in the context of an arguably secular historical event, but instead can be traced to concerted campaigns by religious groups to install such monuments to endorse religion. *See infra* note 5. Campaigns by religious groups to place Ten Commandments displays on public property are not just artifacts of history, of course, but continue unabated today. *See, e.g.*, *Ten Commandments Take Center Stage*, ACLU Freedom Network (Jan. 7, 2000), *at* http://archive.aclu.org/news/2000/w010700b.html; *Religious Right Campaign Launched From Upper Michigan*, Freethought Today (Aug. 1997), *at* http://www.ffrf.org/fttoday/1997/august97/front_page.html.

itself, noting that "the Cross does not become imbued with the mountain's history merely because it was erected upon it. Mount Davidson will retain its historical significance with or without a cross atop it").

Third, courts must evaluate the nature of the display, asking whether the same historical goals could be readily achieved in a secular or less religious fashion. *See, e.g.*, *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 707 (1994) (emphasizing the presence of neutral "alternatives" and noting that the State's asserted interests "could be 'readily accomplished by other means'") (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 124 (1982)); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 384 (6th Cir. 1999) (invalidating School Board's use of prayers mentioning Jesus when asserted purpose of "bring[ing] a more businesslike decorum to [Board] meetings" could have been accomplished by more secular means).[3] The ready availability of nonreligious alternatives to advance the same secular interests enhances the message of endorsement.[4]

[3] Although the Court's opinion in *Lynch* suggested that consideration of available secular alternatives might in some cases be "irrelevant," 465 U.S. at 681 n.7, the Court was not applying the endorsement test, which was fully articulated for the first time in Justice O'Connor's concurrence in *Lynch* and elaborated in her concurrence in *Allegheny*. Of course, it is not the case that "an inference of endorsement arises every time government uses a symbol with religious meaning if a 'more secular alternative' is available." *Allegheny*, 492 U.S. at 636 (O'Connor, J., concurring) (calling such an approach "too blunt an instrument for Establishment Clause analysis"). Instead, as the Court recognized in *Kiryas Joel*, the availability of alternatives is one factor that may affect whether "the specific practice in question" conveys a "message that religion or a particular religious belief is favored or disfavored." *Allegheny*, 492 U.S. at 637 (O'Connor, J., concurring).

[4] There are some texts or symbols that so clearly promote one faith over others, or promote religion over nonreligion, that any effort to justify the government's display of them for historical or other reasons should be

Fourth, courts must evaluate whether the asserted historical rationale is consistent with the government's treatment of comparably aged works. Thus, if the government invoked a preservationist rationale to retain a Ten Commandments monument from 40 years ago but made no effort to preserve secular monuments of comparable age, a court could legitimately conclude that the Ten Commandments monument was preserved for religious rather than historical reasons, and that a reasonable observer would perceive the Ten Commandments display as endorsing religion.

Finally, courts should consider whether there is a persuasive, legitimate reason that the display must be preserved on public property rather than in a museum. Thus, for example, the retention of Moses holding the Ten Commandments as part of a larger display in a sculptured wall of a government building is properly viewed more favorably than the continued display in a public park of a granite Ten Commandments monolith that could be moved to

---

viewed with extraordinary skepticism. *See, e.g.*, *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) ("There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land by the City of Eugene violates the Establishment Clause[, b]ecause the cross may reasonably be perceived as governmental endorsement of Christianity."); *Jewish War Veterans of the United States v. United States*, 695 F. Supp. 1, 14-15 (D.D.C. 1987) (holding that a cross, "[t]he principal symbol of Christianity, this nation's dominant religion, simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message"); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 684 (6th Cir. 1994) (ordering the removal of a portrait of Jesus from the hallways of a public school because Jesus "is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive"); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000) (holding that statue of Jesus in city park created impermissible perception of endorsement of religion, because "there is no doubt as to the obvious religious message imparted by the statue").

a museum without harm, or than the display of a Ten Commandments poster in a courtroom or a similar plaque upon a government building, either of which can easily be taken down. *Cf.* Letter from Chief Justice William H. Rehnquist to Nihad Awad & Ibrahim Hooper (Mar. 11, 1997) (responding to request that the depiction of Muhammad be removed from the wall of the Supreme Court courtroom and noting that the depiction was "part of an architectural and aesthetic unit" whose alteration "would impair the artistic integrity of the whole"). The government's refusal to transfer a display that is easily transportable to a more appropriate setting may reflect an impermissible purpose or cause the display to convey a message of endorsement of religion.

In this case, the Fifth Circuit identified no non-religious aspect of history that the Ten Commandments monument depicts; it enunciated no event of secular historical significance that the monument commemorates; it failed to evaluate the secular ways in which the Eagles' efforts could have been acknowledged; it neglected to analyze the State's treatment of similarly aged items; and, finally, it provided no reason that the monument, if it truly has historical significance, could not be moved easily to a museum. Instead, the court relied solely on the lapse of forty-two years since the installation of the monument on the Texas State Capitol grounds to assert that "[h]istory matters here." Pet. App. 16a. This assertion, which conflates "history" with "longevity," necessitates a reversal of the decision below.

II. The Absence Of A Previous Challenge To A Longstanding Religious Display Deserves No Weight In The Constitutional Calculus.

The Fifth Circuit purported to bolster its conclusion that the Ten Commandments monument at issue here conveyed no message of endorsement by pointing to the absence of any prior constitutional challenge. Indeed, the Fifth Circuit found

that "[t]his quiescence is remarkable" because "Travis County, the seat of state government and the home of the University of Texas," is "not lacking in persons willing and able to seek judicial relief from perceived interferences with constitutional rights." Pet. App. 16a; *cf. Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (noting that "the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its annual Christmas display for some years").

The Fifth Circuit's analysis is fundamentally flawed. The court of appeals' unsupported assertion about the abundance of potential plaintiffs ignores the substantial risks taken and the severe personal sacrifices made by plaintiffs courageous enough to challenge governmental religious displays and practices. As reflected in reported cases and *Amici*'s own experience, plaintiffs in Establishment Clause cases often face threats and intimidation and are frequently the victims of violent attacks. Many individuals are understandably reluctant to put themselves and their families at risk by bringing Establishment Clause challenges.

Some of this reluctance is a product of certain particularly unfortunate eras in our nation's history. Many Ten Commandments displays were erected, for example, during the period following World War I, *see, e.g.*, *Freethought Society*, 334 F.3d at 251 (Ten Commandments plaque dedicated on December 11, 1920), a time when the "enormous heightening of patriotic Americanism . . . reduced the general tolerance for nonconformist behavior," with "the brunt of nativistic intolerance" borne by religious minorities (including Jews, Catholics, Eastern Orthodox, and marginal Protestant denominations). Sydney E. Ahlstrom, *A Religious History of the American People* 899 (1972); *see also Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (considering threat by Oregon officials to close a Catholic school under a

compulsory-education law); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (reviewing conviction of instructor at Zion Parochial School for teaching a foreign language).[5] Such religious hostility was exacerbated by the Great Depression, which gave birth to a number of "religio-political movements" influenced by "nativist bigotry," fostering an atmosphere of "hate and fear." Ahlstrom, *Religious History*, *supra*, at 926-29; *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (considering a challenge brought by a Jehovah's Witness to a compulsory flag-salute regulation); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (same).

The 1950s – when another wave of Ten Commandments displays occurred – witnessed "a new form of patriotic piety that was closely linked to the 'cold war.'" Ahlstrom, *Religious History*, *supra*, at 954. "[T]here seemed to be a consensus that personal religious faith was an essential element in proper patriotic commitment." *Id.* The absence of plaintiffs willing to bring an immediate challenge at the risk of great personal cost during these times is hardly surprising.

But regardless of the overall tolerance of the era, individuals who have had the courage to challenge government sponsorship of religion, including some who appeared before this Court, have been the target of severe persecution and abuse from the public. For example, after

---

[5] During this period, plaques of the Ten Commandments and other religious displays were dedicated as part of a campaign spearheaded by the International Reform Bureau ("IRB"). The IRB called itself "a union home missionary society to prevent the heathenizing of our Christian land." *History of the International Reform Bureau* 2 (1910), *reprinted in Patriotic Studies of a Quarter Century of Moral Legislation* (Wilbur F. Crafts ed. 1911). The IRB stated in a self-published magazine its hope that "[t]he whole world might soon be compelled to face the law of God" if its Ten Commandments campaign was successful. *The Very Time to Post the Commandments*, 20th Century Quarterly, Dec. 1918, at 22.

Vashti McCollum brought suit in 1945 objecting to a school district's practice of allowing teachers employed by religious groups to provide religious instruction to public school students in their schools during the regular school day, *see Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948), his house was vandalized, he received hundreds of pieces of hate mail, and his son was physically attacked. *See* Robert S. Alley, *Without a Prayer: Religious Expression in Public Schools* 84-89 (1996).

Similarly, the children of one of the plaintiffs in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (challenge to government-sponsored prayer and Bible reading in public schools), were beaten on their way home from school, and their house was firebombed. Alley, *Without a Prayer*, *supra*, at 98. And the "emotional scars" from harassment suffered by the plaintiff in *Lynch v. Donnelly*, 465 U.S. 668 (1984), went so deep that "[w]hen queried by a newspaper feature writer whether he would ever again take a stand for a controversial belief that clashed with mainstream public opinion, he replied, 'Never!'" Wayne R. Swanson, *The Christ Child Goes to Court* 20-21 (1990).

The plaintiffs in *Bell v. Little Axe Independent School District No. 70*, 766 F.2d 1391 (10th Cir. 1985), who sued to stop the distribution of Gideon Bibles and teacher-supervised religious meetings at their children's public school, were the victims of a campaign of "threatening telephone calls and letters." 766 F.2d at 1397. The plaintiffs' children "were called 'devil worshippers' by other students and, in one instance, an upside down cross was hung on" the locker of one of the plaintiffs' sons. *Id.* Plaintiff Joann Bell received calls from persons threatening to burn her house down, rape her, and do violence to her children. *See* Alley, *Without a Prayer*, *supra*, at 107-08. In 1981, as the Tenth Circuit recounted, "the Bells' home was destroyed by a fire of suspicious origin." 766 F.2d at 1397. As Joann Bell

described the devastation, "we essentially lost everything we had." Alley, *Without a Prayer*, *supra*, at 108.

Lisa Herdahl, the mother of six children attending public school in Mississippi, brought suit in 1994 challenging school-sponsored prayer and religious Bible instruction in her children's school. *See Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902 (N.D. Miss. 1995). As a result of the family's challenge to the school district's practices, Herdahl's children were taunted by their classmates, who called them "atheists and devil worshippers." Stephanie Saul, *A Lonely Battle in the Bible Belt: A Mother Fights to Halt Prayers at Miss. School*, Newsday, Mar. 13, 1995 at A8. Other children were threatened with beatings by their parents if they were caught talking to, or playing with, the Herdahl children. Alley, *Without a Prayer*, *supra*, at 177. Herdahl received threats that her home would be firebombed and that her children would be harmed, and she eventually was driven to quit her job to stay home and protect her children. *See id.* at 182, 186.[6]

More recently, the plaintiff in *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), was repeatedly harassed

---

[6] As the foregoing cases confirm, the children of adults who challenge unconstitutional government-sponsored religious practices are particularly vulnerable to ostracism and other victimization, making individuals who have children especially wary of putting their loved ones at risk by bringing Establishment Clause cases. The cases further demonstrate the often vicious nature of the harassment visited on persons who challenge or object to majority religious practices. *See also Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169, 1172 (S.D. W.Va. 1985) (a Jewish public school student who read during a school-sponsored moment of silence for "contemplation, meditation, or prayer" was taunted by a classmate, who told him that "if I prayed all the time, maybe I could go to heaven with all the Christians when Jesus came for the second time instead of, as he put it, going down with all the other Jews").

after she sued to enjoin her town council from opening its meetings with sectarian prayers. Her cars were vandalized and her pets were poisoned; someone broke into her home and beheaded her pet parrot, leaving behind a note reading "You're next!" *See* Denyse Clark, *Parrot's Death Latest Threat To Woman In Prayer Case*, The Herald (Rock Hill, S.C.), Aug. 17, 2004 at 1A, *available at* 2004 WL 89767640. *See generally* Alley, *Without a Prayer*, *supra*, (describing intimidation, harassment, and violence suffered by other Establishment Clause plaintiffs).

Amici have first-hand experience with the harassment and intimidation of plaintiffs in Establishment Clause cases. *Amicus* PFAWF, for example, was co-counsel to Lisa Herdahl in the lawsuit discussed above. Earlier this year, other PFAWF clients – Jewish parents Steven and Carol Rosenauer – were also victimized for filing a lawsuit in federal court in Florida challenging government-sponsored Christian prayer at the meetings of their local school board. Soon after the case commenced, a local Christian ministers' group held a public rally to announce its support for the school board's practice, and the head of the group urged the Rosenauers to "move." Laura Green, *A Show of Defiance: Prayer Supporters Rally; A minister tells the crowd of 200 that the couple who filed suit against the School Board should "move,"* Sarasota Herald Trib., Feb. 25, 2004 at BM1. The family received threatening phone calls, including one saying "we know where you Jews live and if you don't drop the lawsuit there will be trouble." During the Jewish holiday of Passover, vandals threw red paint on the Rosenauers' home and truck. *Religious Expression: Hearings Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on Judiciary*, 108th Cong. (June 8, 2004) (Testimony of Steven Rosenauer), *available at* 2004 WL 1304689.

Plaintiffs challenging government displays of the Ten Commandments are no less likely to be subject to harassment and abuse in their communities. When Americans United client Melinda Maddox challenged Alabama Chief Justice Roy Moore's placement of a two-and-a-half-ton Ten Commandments monument in the rotunda of the Alabama State Judicial Building, *see Glassroth v. Moore*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 540 U.S. 1000 (2003), the windows were shot out of her house, her automobile was vandalized, her law practice was boycotted, and she received multiple death threats. *See* Rob Boston, *Plucky Lindy*, Church & State 11 (Apr. 2004). And her parents – who were both battling cancer at the time – were similarly threatened and harassed. The police did not take the threats seriously. When Maddox asked community leaders to condemn the threats of violence, they responded by telling her to drop out of the case. Eventually, Maddox was forced to leave town. *See id.*

As *Amici* have seen firsthand on numerous occasions, the result of all of this intimidation and violence is that many individuals victimized by unconstitutional governmental religious practices and displays simply do not come forward.

Opinions such as that of the Fifth Circuit below thus vastly understate the genuine risks to individuals and their families who challenge a government religious display or practice, particularly when the individuals are members of a minority faith or are non-religious. Such challenges are undertaken only at great risk. Consequently no plaintiff may come forward to challenge a particular religious display or practice, or it may take years for an individual to muster the courage to do so.

In light of the real and substantial hurdles that Establishment Clause plaintiffs face, the failure of a plaintiff to come forward at an earlier date to challenge the constitutionality of a religious display or practice should be

given no weight in the constitutional analysis. The lack of a prior challenge does not in any way suggest that the display or practice comports with the requirements of the Establishment Clause, nor does it demonstrate that plaintiffs have slept on their rights.[7]

Indeed, statements such as those in the opinion below may actually exacerbate the situation. Placing weight on the absence of earlier challenges may have the unintended consequence of rewarding or even encouraging the intimidation that all too often causes potential plaintiffs to hesitate to come forward in the first place. Moreover, to the extent that the absence of a challenge reflects potential plaintiffs' sincere concern for their personal safety, reliance on that absence may serve to deepen the alienation that adherents of minority religions feel, and thus may reinforce the religious display's unconstitutional message of exclusion.

In short, the Fifth Circuit erred in viewing the absence of a prior constitutional challenge as evidence that the Ten Commandments monument erected on the grounds of the Texas State Capitol does not convey a message of endorsement to a reasonable observer.

CONCLUSION

The decision of the court of appeals should be reversed.

---

[7] The absence of dissent within the government is also without relevance. Religious minorities and atheists may have great difficulty being elected in some areas, making it difficult if not impossible for their voices to be heard through official channels.

Respectfully submitted,

AYESHA KHAN
RICHARD B. KATSKEE
ALEX J. LUCHENITSER
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, N.E.
Washington, DC 20002
(202) 466-3234

IAN HEATH GERSHENGORN*
WILLIAM M. HOHENGARTEN
VICTORIA H. JUEDS
THOMAS G. PULHAM
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, DC 20036
(202) 467-4999

December 13, 2004

* Counsel of Record